BEFORE

THE PUBLIC SERVICE COMMISSION

OF

SOUTH CAROLINA

Docket No. 2005-67-C

TESTIMONY OF DOUGLAS DUNCAN MEREDITH

Q. PLEASE STATE YOUR FULL NAME, PLACE OF EMPLOYMENT, AND BUSINESS ADDRESS.

A. My full name is Douglas Duncan Meredith. I am employed by John Staurulakis, Inc. (JSI). JSI is a telecommunications consulting firm headquartered in Seabrook, Maryland. My office is located in a suburb of Salt Lake City, Utah (547 Oakview Lane, Bountiful, Utah 84010).

Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE AND EDUCATIONAL BACKGROUND.

A. At JSI, I am the Director of Economics and Policy. In this capacity, I assist clients with the development of policy pertaining to economics, pricing and regulatory affairs. I have been employed by JSI since 1995. Prior to my work at JSI, I was an independent research economist in the District of Columbia and a graduate student at the University of Maryland – College Park.

In my employment at JSI, I have participated in numerous proceedings for rural and non-rural telephone companies. These activities include, but are not limited to, the creation of forward-looking economic cost studies, the development of policy related to the application of the rural safeguards for qualified local exchange carriers, the determination of Eligible Telecommunications Carriers ("ETC"), and the sustainability and application of universal service policy for telecommunications carriers.

In addition to assisting telecommunications carrier clients, I have served as the economic advisor for the Telecommunications Regulatory Board of Puerto Rico since 1997. In this capacity, I provide economic and policy advice to the Board Commissioners on all telecommunications issues that have either a financial or economic impact.

I participate or have participated in numerous national incumbent local exchange carrier and telecommunications groups, including those headed by NTCA, OPASTCO, USTA, and the Rural Policy Research Institute. My participation in these groups focuses on the development of policy recommendations for advancing universal service and telecommunications capabilities in rural communities and other policy matters.

I have testified or filed pre-filed regulatory testimony in various states including South Carolina, Vermont, New Hampshire, New York, Michigan, North Dakota,

South Dakota, Texas and Wisconsin. I have also participated in regulatory proceedings in many other states that did not require formal testimony, including Florida, Louisiana, Mississippi, North Carolina, Puerto Rico, Utah, and Virginia. In addition to participation in state regulatory proceedings, I have participated in federal regulatory proceedings through filing of formal comments in various proceedings and submission of economic reports in an enforcement proceeding.

I have a Bachelor of Arts degree in economics from the University of Utah, and a Masters degree in economics from the University of Maryland – College Park. While attending the University of Maryland – College Park, I was also a Ph.D. candidate in Economics. This means that I completed all coursework, comprehensive and field examinations for a Doctorate of Economics without completing my dissertation.

Q. ON WHOSE BEHALF ARE YOU PRESENTING THIS PRE-FILED DIRECT TESTIMONY?

A. I am testifying on behalf of the four rural incumbent local exchange carriers: Farmers Telephone Cooperative, Inc., Hargray Telephone Company, Home Telephone Company, Inc., and PBT Telecom, Inc. (the "RLECs").

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. I address the following issues: 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17 and 21. I provide testimony supporting the RLEC position on each of these issues.

Combined with the testimony of Ms. Valerie Wimer, our testimonies address each of the remaining issues in this arbitration.

ISSUE 1: Should the Agreement state that it is pursuant only to Sections 251(a) and (b) and 252 of the Act?

Q. WHAT IS BEING DISPUTED WITH REGARD TO ISSUE 1?

A. Issue number one centers on a dispute as to the scope of the interconnection agreement between the RLECs and MCI. The RLECs' proposed language would clearly state that this agreement is pursuant only to those subparts of Section 251 that apply. MCI's position is that, while it has requested service only pursuant to Sections 251(a) and (b) of the Act, the entire Communications Act of 1934, as amended, governs this interconnection agreement.

Q. WHY SHOULD THE COMMISSION ADOPT THE RLECS' POSITION FOR ISSUE 1?

A. The RLECs believe MCI's request to have the entire Act referenced is (1) too broad for purposes of an interconnection agreement and (2) contrary to the standard of review required by this Commission.

First, the RLECs strongly believe an interconnection agreement should be defined as narrowly as possible in order to avoid possible misunderstandings of the

written agreement. This is good business practice and should be followed whenever possible.

Second, for arbitrated interconnection agreements, there are clearly defined limits in resolving open issues. Section 252(c) refers to standards for arbitration and states:

> (c) Standards for Arbitration.--In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall-- (1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Under this standard for arbitration, the Commission is required to ensure its decision meets the requirements of Section 251 and FCC regulations pursuant to Section 251 for resolution of open items.

Furthermore, Mr. Darnell refers to Section 252(e)(2) of the Act for support that discrimination and public interest concerns solely govern this Commission's ground for rejection. (Darnell Direct at 7:11-13) I have reread this section of the Act and find Mr. Darnell's discussion does not refer to arbitrated reviews and therefore does not provide support for MCI's position. (Darnell Direct 7:15-16; suggesting the legal authority is "very broad") When an agreement is adopted

under arbitration, as is the case in this proceeding, the grounds for rejection reside solely under:

> 252(e)(2)(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251, or the standards set forth in subsection (d) of this section.

When viewed in the correct context, Mr. Darnell's support fails to persuade that the Act generally governs this arbitrated interconnection agreement. Instead, the scope of the interconnection should be exact, precise and specific. Since the items requested by MCI are found in subparts (a) and (b), the scope of the governing law should be limited to these subparts.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION ON THIS ISSUE?

A. I urge the Commission to adopt the RLECs' proposed language and reject MCI's proposed language. This recommendation is consistent with FCC rules governing the scope of this arbitration. Since MCI has stated it is not seeking to impose any Section 251(c) duties on the RLECs, there is no need to address the rural exemption issue as proposed by MCI.

ISSUE 4: Should parties be required to keep providing service to one another during dispute resolution over payment for service?

Q. WHAT IS THE DISPUTE WITH RESPECT TO ISSUE 4?

A. Issue 4 involves whether the companies should be required to continue providing service to each other during the pendency of dispute over payment.

Q. MCI ASSERTS (DARNELL DIRECT AT 39) THAT IT IS INDUSTRY PRACTICE, AND IS TYPICALLY EXPECTED BY REGULATORS, THAT CARRIERS NOT DISCONNECT OR REFUSE SERVICES TO END USERS FOR NON-PAYMENT OF DISPUTED CHARGES. HOW DO YOU RESPOND?

A. First of all, MCI is not a typical "end user" but another telecommunications carrier. The nature of disputes among carriers is much different from a situation where an end user customer disputes, say, a particular long distance charge on a single monthly bill. As Mr. Darnell acknowledged in his testimony, billing disputes between carriers can take a great deal of time to resolve. Furthermore, the dispute may be of an ongoing nature, where the disputed amount grows quite large over time. If both companies remain viable and solvent during the lengthy dispute process, the RLEC eventually would get whatever money is due. However, the RLECs are concerned about the recent increase in bankruptcy activity in the telecommunications industry and, in particular, the recent corporate history of MCI's parent company. In addition, there is a considerable difference

in size between MCI and the RLECs. What may seem a small billing dispute to MCI could be a much more significant portion of an RLEC's annual revenues.

Q. WHY DO THE RLECS BELIEVE THEY SHOULD BE ABLE TO DISCONNECT SERVICES TO MCI DURING THE PENDENCY OF A DISPUTE?

A. As noted above, a large outstanding amount owed can be accrued if there is an ongoing dispute over billing. This dispute can drag on for a long time, sometimes years. If MCI were to enter bankruptcy during that time, the RLECs' customers would get stuck with the bill. Even if MCI did not enter bankruptcy but continued to accrue a large disputed balance, it is one-sided and unfair to expect that the RLEC should be the sole bearer of the risk associated with the accrual of unpaid amounts. The RLECs' best protection when dealing with carriers who accrue large amounts of unpaid bills (whether disputed or not) lies in their ability to terminate service and mitigate the additional accrual of amounts owed.

Q. HAVE THE RLECS PROPOSED ANOTHER ALTERNATIVE TO MCI?

A. Yes. While the RLECs believe the best way to protect their customers' interests is to be able to terminate service to another carrier if large amounts of unpaid bills are accrued, the RLECs have proposed language that would provide for continued service by both parties during the pendency of a billing dispute as long as the disputing party pays the disputed amounts into an escrow account.

Q. WHY IS IT APPROPRIATE TO REQUIRE PAYMENT INTO AN ESCROW ACCOUNT?

A. Payment into escrow is appropriate because it allows the parties to share the burden of a billing dispute, and protects the parties in the event the disputing party accrues large unpaid amounts that it is later unable to pay. Allowing MCI to not pay disputed amounts while continuing to receive service from the RLEC assumes that MCI will always be successful in a dispute, or if it is not, that it will be willing and able to pay the appropriate amounts owed when the dispute is resolved. These assumptions are faulty, and requiring the disputing party to pay disputed amounts into escrow protects both parties' financial interests.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. I recommend the Commission adopt language allowing the RLECS to terminate service with MCI during the pendency of a dispute. Alternatively, the Commission should require disputed amounts to be placed in escrow pending resolution of a dispute.

ISSUE 5: Should the parties' liability to each other be limited, and should they indemnify each other for certain claims?

Q. WHAT IS THE NATURE OF THE DISAGREEMENT WITH RESPECT TO ISSUE #5?

A. This issue deals with two separate and distinct concepts, limitation of liability and indemnification.

Q. MCI CHARACTERIZES THESE AS "LEGAL" ISSUES WHICH SHOULD NOT BE DETERMINED BY THE COMMISSION. DO YOU AGREE?

A. No. While limitation of liability and indemnification are legal concepts, the real question is the nature of the obligations of the parties to one another, and this is a perfectly appropriate question for the Commission to address. The RLECs are not arguing about the legal definition of indemnification or the application of any legal terms in the Telecommunications Act. Rather, the RLECs are merely trying to set appropriate parameters on the obligations of the parties with respect to one another and with respect to third parties. These are exactly the kinds of issues that are appropriately addressed by the Commission in an arbitration proceeding under Section 252 of the Act. The parties are not able to agree on these points and, without a fair resolution of these issues, the terms and conditions of the interconnection agreement will not be resolved.

Q. WITH RESPECT TO INDEMNIFICATION, WHAT IS THE NATURE OF THE PARTIES' DISAGREEMENT?

A. Indemnification is a concept that essentially means you will stand in the other party's shoes with respect to claims by third parties. In other words, if a third party sues MCI, the RLEC agrees to indemnify MCI (stand in MCI's shoes) if the claim relates to the RLEC's actions. Likewise, if a third party sues the RLEC, MCI agrees to indemnify the RLEC (stand in the RLEC's shoes) if the claim relates to MCI's actions. The parties agree on this. Where the parties disagree is with respect to claims by third parties that are related to actions by MCI's or RLEC's end user customers. The RLECs believe the parties should indemnify one another for the actions of their own respective end user customers.

Q. WHY DO THE RLECS BELIEVE IT IS APPROPRIATE FOR THE PARTIES TO INDEMNIFY ONE ANOTHER FOR THE ACTIONS OF THEIR OWN END USER CUSTOMERS?

A. This is simply a matter of fairness. The parties are interconnecting their networks and will be exchanging traffic. This is not necessarily a voluntary arrangement, but is required by law. In addition, the terms and conditions of the interconnection will not necessarily be mutually agreed upon, but may be dictated by applicable law and/or by the results of arbitration. In other words, this is not a typical contract by which two parties voluntarily enter into a business arrangement. In consideration of that fact, it is only fair that MCI indemnify the RLECs with respect to any actions of MCI's end user customers.

Q. MCI NOTES THAT THE PARTIES CANNOT INDEMNIFY EACH OTHER FOR THE ACTIONS OF ENTITIES OVER WHICH THEY HAVE NO OWNERSHIP OR CONTROL. HOW DO YOU RESPOND?

A. Ownership and control are simply not relevant here. We are not asking MCI to control the actions of its customers any more than the RLECs can control the actions of their own end user customers. We are simply saying that, in the event an end user customer's actions lead to a third party lawsuit, it is more appropriate for that customer's service provider to defend the suit than it is for the other party to defend the suit. The RLECs simply cannot be required to take on an unknown amount of liability for customers with whom they have no relationship whatsoever. MCI has a business relationship with its own customers, receives the financial benefits associated with providing service to those customers, and is in a better position than the RLEC to control the actions of those customers. Thus, it is only fair that MCI should indemnify the RLEC for the actions of MCI's customers in the event of a third party claim. The RLECs likewise stand ready to indemnify MCI for the actions of the RLECs' respective end user customers. This is a mutual and reciprocal provision that is fair and reasonable. The RLECs are not asking MCI to be responsible for the actions of MCI's customers. MCI's customers should be responsible for their own actions. However, to the extent that some liability may attach to a carrier for the actions of MCI's customers, that carrier should be MCI and not the RLEC. Again, the converse is also true, and the RLECs stand ready to indemnify MCI for the actions of the RLECs' customers.

Q. WHAT IS THE NATURE OF THE DISPUTE WITH RESPECT TO THE LIMITATION OF LIABILITY PROVISIONS?

A. Unlike indemnification, limitation of liability has nothing to do with third parties but is strictly between MCI and the RLECs. Again, I believe it is important to recognize that this is not a typical voluntary contract. Because the RLECs are required by law to allow MCI to interconnect and use their facilities, the RLECs must ensure that, in doing so, they are not opening themselves and their customers up to unknown and potentially large amounts of liability. For this reason, the RLECs have proposed that the parties limit their liability to one another so that they may recover for their direct damages, but not for extraordinary items like lost profits, punitive damages, etc. This limitation is reasonable and common in commercial agreements. Consequential and punitive damages, by their very nature, can be completely out of proportion to the actual and direct damages sustained as a result of a breach of contract.

Q. MCI CHARACTERIZES THE RLECS' POSITION AS TRYING TO ESCAPE LIABILITY FOR WRONGS COMMITTED IN THE EYES OF THE LAW. HOW DO YOU RESPOND?

A. The RLECs are not trying to avoid liability in the event of a breach or wrongful conduct, as MCI asserts. They are merely trying to limit the damages to appropriate compensatory or direct damages. This is commercially reasonable, in addition to being reciprocal and mutual. In the event of a breach of contract of any kind, the injured party would be able to recover all damages necessary to

compensate for the direct loss sustained as a result of the breach. What they would not be able to recover would be hypothetical damages like lost profits, or punitive damages, which are unrelated to the direct damages caused by the breach.

Q. MCI ALSO HAS PROPOSED TO INSERT LANGUAGE IN SECTION 22.4 THAT REFERENCES "APPLICABLE LAW." WHAT IS THE RLECS' POSITION ON THE INCLUSION OF THAT ADDITIONAL LANGUAGE?

A. The RLECs do not believe it is warranted. The purpose of Section 22.4 is to make it clear that the parties do not have any obligation to each other with respect to intellectual property issues. The inclusion of the language "except as required by applicable law" defeats the purpose of this attempt at clarification by opening the parties' obligations up to anything that could be argued under the law.

Q. DID THE RLECS PROPOSE SOME SUBSTITUTE LANGUAGE TO MCI?

A. Yes. As I understand it, MCI is concerned that the parties' performance under the agreement will necessarily involve some use by each party of the systems or facilities of the other party. This may involve licenses, permits, or other intellectual property rights held by third parties. MCI wanted to insure that its performance of the contract did not infringe on the intellectual property rights of third parties. The RLECs proposed the following language to MCI:

> In the event that the services provided to MCI by RLEC require additional licenses or permissions from third

parties, RLEC agrees to negotiate to acquire such licenses and permissions in good faith to allow RLEC to continue to provide services to MCI. In the event that such additional licenses or permissions require additional fees or costs to RLEC, MCI agrees to be liable to RLEC for the entire amount of such additional fees and costs. In the event that such third party refuses to grant such license and it is necessary to commence an action, arbitration or other proceeding against such third party to secure such licenses and permissions, MCI agrees to be liable to RLEC for any and all costs, including attorney fees, associated with such action.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. I recommend the Commission adopt the language proposed by the RLECs for indemnification and limitation of liability.

ISSUE 6: Should *End User Customer* be defined as only customers directly served by the Parties to the contract?

Q. WHAT IS THE CONTROVERSY SURROUNDING ISSUE 6?

A. This issue, as well as other related issues 10(a), 15, and 17, revolves around the nature of a Section 251 interconnection agreement. The matter ultimately reduces to whether an intermediary carrier, MCI, is entitled to seek a local interconnection with an RLEC for the purpose of exchanging traffic for a third party, in this case Time Warner Cable Information Services ("TWCIS"), which is a VoIP service provider offering VoIP service. In issue 6, the question is whether the word

"indirectly" should be included in the definition of *End User Customer* as MCI proposes.

The RLECs assert that the carrier directly serving the end user customer is the only carrier entitled to request interconnection for the exchange of traffic under Section 251. Other telecommunications carriers providing local exchange service to customers and wishing to exchange traffic with the RLECs must establish individual interconnection or traffic exchange agreements with the RLECs.

Q. RELYING ON SECTION 251(a) OF THE ACT, MCI ASSERTS THAT "'INDIRECT' SERVICE TO CUSTOMERS IS EXPRESSLY RECOGNIZED UNDER THE ACT." (PETITION AT 12) IS THIS ASSERTION CORRECT?

A. No. MCI's reliance on Section 251(a) of the Act to conclude that the Act expressly recognizes "indirect" service to customers is misplaced. Section 251(a) of the Act addresses obligations of all telecommunications carriers to interconnect directly or indirectly with other telecommunications carriers. Section 251(a) does not address "indirect" service to customers.

Q. DOES THE ACT OR DO FCC REGULATIONS PROVIDE FOR A TELECOMMUNICATIONS CARRIER THAT DOES NOT DIRECTLY SERVE AN END USER CUSTOMER TO INTERCONNECT WITH AN RLEC UNDER SECTION 251 FOR THE EXCHANGE OF THAT END USER'S TRAFFIC?

A. No. The rules for interconnection contemplate that an interconnection agreement for the exchange of traffic for telephone exchange service will be between the parties whose end users originate and terminate telecommunications. The RLECs understand that MCI seeks agreement with the RLECs in order to provide access to the PSTN for TWCIS. From its certification for non-rural areas in South Carolina, TWCIS' stated purpose is to provide "facilities-based Internet Protocol ('IP') voice services targeted to the residential market." (Public Service Commission of South Carolina, Order No. 2004-213, Docket No. 2003-362-C, May 24, 2004 at 4). TWCIS seeks to exchange its end user voice services with the RLECs through its relationship with MCI. (Id. at 5)

Q. HOW DOES SECTION 251 REFER TO PARALLEL DUTIES BETWEEN LOCAL EXCHANGE CARRIERS AND THEREBY MAKE IT INAPPROPRIATE TO INSERT THE WORD "INDIRECT" INTO THE DEFINITION OF END USER CUSTOMER?

A. The FCC's rules implementing interconnection uniformly address interconnection as a bilateral agreement between two carriers each serving end user customers within the same local calling area. Section 251(b) describes duties for each "local

exchange carrier" with respect to other "local exchange carriers." The FCC's Local Competition Order discusses the exchange of traffic for local interconnection purposes in which two carriers collaborate to complete a local call. (Local Competition Order, CC Docket 96-98, FCC 96-325 at 1034)

The limitation that two carriers directly serving local customers must provide for the exchange of traffic through an interconnection agreement makes sense because the duties imposed by Section 251(b) of the Act are intended to be parallel duties between two carriers. Where MCI acts as an intermediary for a facility-based VoIP service provider, such VoIP service provider is not required to provide dialing parity or local number portability and, therefore, the duties of the RLECs and the VoIP service provider are not parallel, as the VoIP service provider is not designated as a telecommunications service provider at this time.

Lastly, the FCC's regulation on reciprocal compensation specifically refers to the direct relationship of the carrier to the end user customers in the exchange of traffic.

> For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of <u>telecommunications traffic that originates on the network facilities of the other carrier</u>.

(47 CFR § 51.701(e)) (Emphasis supplied). The RLECs want the traffic exchanged with MCI to include only intraLATA traffic directly generated by MCI

end user customers. The language proposed by MCI for issue 6 should not be adopted.

Q. MR. DARNELL USES AN OHIO DECISION TO SUPPORT THE INSERTION OF THE WORD 'INDIRECT' IN THIS DEFINITION (DARNELL DIRECT AT 19:4-24). WHAT IS YOUR RESPONSE?

A. The Ohio case addressed whether an incumbent carrier can avoid interconnection with MCI. The question in Ohio was whether or not MCI was acting as a carrier when it provided exclusive services to a VoIP service provider. The same issue was raised in Illinois where Sprint is attempting a similar arrangement with MCC Telephony of Illinois, Inc., an affiliate of Mediacom Communications Corporation, a cable television provider. The Illinois proposed order references two court cases that run counter to the Ohio finding that MCI is acting as a carrier. The Illinois Commerce Commission's proposed order references the Ohio decision used by Mr. Darnell and then concludes:

> Unfortunately for Sprint, however, *Virgin Islands Telephone* [*Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999)] compels the Commission to conclude that Sprint is not providing a telecommunications service, as that term is defined in Section 153(46) of the Federal Act. As noted by Petitioners, the D.C. Circuit Court concluded that making telecommunications "effectively available directly to the public" so as to constitute a telecommunications service can not be done through a third party that is the entity actually/directly serving the public. Because, in this situation, Sprint is not serving the public directly and instead is providing its services to MCC, which is the entity directly serving the public (albeit through the services procured from Sprint), the Commission finds itself bound by the *Virgin Islands Telephone* decision and concludes that Sprint is not

> providing a telecommunications service. Since Sprint is not providing a telecommunications service under the *Virgin Islands Telephone* decision, Sprint is not a telecommunications carrier with which Petitioners must negotiate local number portability and reciprocal compensation under subsections (a) and (b) of Section 251 of the Federal Act.

(Illinois Commerce Commission, 05-0259, May 13, 2005 at 11) From this discussion, it is important to recognize that end user customers must be directly served by carriers in order to enter into an agreement whose purpose is to exchange traffic and request/perform other duties under Section 251(b). The RLECs are not avoiding interconnection with MCI; rather they seek to properly limit the interconnection with MCI for MCI-originated traffic consistent with the duties imposed under Section 251.

Q. SHOULD MCI BE PERMITTED TO SEEK INTERCONNECTION WITH THE RLECS TO PROVIDE INTERMEDIARY SERVICES TO A VOIP PROVIDER?

A. No. MCI is not entitled to an interconnection agreement with the RLECs to provide intermediary services to VoIP service providers seeking to exchange traffic with the RLECs. It is well known that MCI desires to be an intermediary provider and seeks to use a Section 251 interconnection agreement to make arrangements for the exchange of intraLATA traffic between the RLECs and VoIP service providers. It is inappropriate and outside the domain of an arbitration to bestow MCI the intermediary benefits it seeks. Rather, if a VoIP

service provider desires to exchange telecommunications traffic with the RLECs, it should propose to negotiate an agreement with the RLECs directly.

Q. IS THE TERM "END USER CUSTOMER" DEFINED BY THE COMMUNICATIONS ACT OF 1934, AS AMENDED?

A. No. The term "end user customer" is not defined by the Act. However the term "user" is used in the definition of telecommunications; and this definition conveys the concept of "end user customer." Specifically, telecommunications is defined as:

> Telecommunications.--The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Additionally, when the FCC uses the term "telecommunications user" in defining access to emergency services, it refers to the end user performing the dialing 911. This use also conveys the same meaning of the term "end user customer." (See 47 CFR § 54.101(a)(5)) Lastly, the FCC uses the term "end user customer" in its rules regarding local loop unbundling to indicate the end user customer is at the end of a loop connecting it to the LEC central office. (See e.g., 47 CFR § 51.319(a)).

The proposed use of the term "end user customer" conforms to the definition of "end user" in the American Heritage Dictionary, 4th Edition which states that an

"end user" is "the ultimate consumer of a product, especially the one from whom the product has been designed."

Q. MR. DARNELL SUGGESTS THAT MCI'S CUSTOMER BASE IS BEING RESTRICTED BY THE AGREEMENT. WHAT IS YOUR RESPONSE?

A. I disagree. The RLECs are not preventing MCI from serving any particular end user customer. The RLECs object to MCI's proposed intermediary role with a VoIP service provider insofar as MCI seeks to exchange the VoIP service provider's end user traffic with the RLECs. In this case TWCIS, a VoIP service provider, offers a facilities-based voice service to its own customers, not to MCI customers. (See Time Warner Cable Information Services (South Carolina) LLC tariff at 9 and 14: service "is offered solely to residential Customers who are subscribers to TWCIS's cable modem and/or cable television service;" and "IP Voice Service is offered strictly as an optional feature only to residential customers subscribing to TWCIS's high-speed cable modem data service, to its cable television service, or to both services.") TWCIS is the provider of services to its end users, not MCI. TWCIS, not MCI, must make the necessary arrangements for the exchange of its end user traffic with the RLECs.

Furthermore, Mr. Darnell suggests that TWCIS is reselling MCI services. (Darnell Direct at 18:22-23) This claim is contradicted by TWCIS's assertion that it is a facilities-based provider. (TWCIS Petition to Intervene, Docket No. 2005-67-C at 2) The facts show that TWCIS has a contract with MCI for the exchange

of traffic with the PSTN. The only time a TWCIS customer uses MCI's facilities is when a TWCIS-originated call is destined to the PSTN or when a call from the PSTN is destined for a TWCIS customer. The MCI/TWCIS arrangement is a wholesale arrangement between two facilities-based providers -- MCI and TWCIS. Resale has nothing to with this relationship. Based on the available evidence I reviewed, TWCIS is not reselling MCI retail services in South Carolina.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. I urge the Commission to reject MCI's claim to include "indirect" in the definition of end user customers.

ISSUE 8: Is ISP traffic in the Commission's or FCC's jurisdiction in terms of determining compensation when FX or virtual NXX service is subscribed to by the ISP?

Q. WHAT IS THE PARTIES' DISPUTE ON THIS ISSUE?

A. This issue and the related issues 10(b) and 13 deal with the classification of traffic to be governed by this interconnection agreement. Specifically, the dispute centers on whether ISP traffic sent via a virtual NXX service is to be included as traffic subject to the FCC's interim ISP-bound traffic compensation rules or is

subject to access charges. I incorporate my responses of 10(b) and 13 as part of my response to this issue.

Q. WHAT TRAFFIC SHOULD BE INCLUDED IN THE INTERCONNECTION AGREEMENT?

A. The interconnection agreement is for the exchange of intraLATA traffic between the parties' end user customers.

Q. IT APPEARS THAT THIS ISSUE NECESSARILY INVOLVES AN UNDERSTANDING OF THE TERM "ISP-BOUND TRAFFIC" AS IT HAS BEEN USED BY THE FCC AND THE COURTS. WHAT IS "ISP-BOUND TRAFFIC"?

A. This term was first used by the FCC in 1999 in its Declaratory Ruling. (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-bound Traffic, FCC 99-38, rel. Feb. 26, 1999) After the Court vacated and remanded the Declaratory Ruling, the FCC issued its Order on Remand. In its Remand Order the FCC restates the question that arose regarding ISP-bound Traffic; specifically, "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end user customer to an ISP in the same local calling area that is served by a competing LEC. The Commission determined at that time [in the Declaratory Ruling] that resolution of this question turned on whether ISP-bound traffic 'originates and terminates within a local area.'" (*Order on Remand and Report and Order*, FCC

01-131, rel. Apr. 27, 2001, at 13) Having defined the question, the FCC addressed the jurisdictional nature of ISP-bound traffic as jurisdictionally mixed and largely interstate. In other words, traffic destined for an ISP physically located in the same local calling area as the caller is considered ISP-bound traffic subject to treatment as defined in the FCC's *Remand Order*. All other traffic destined for ISPs is simply considered long distance traffic and is subject to access charges.

The RLECs' proposed scope of their intercarrier compensation obligation is consistent with the question before the FCC. This question has always been whether calls to an ISP physically located in the same local calling area as the calling party are to be treated the same as calls to a local business. Indeed, the CLECs' long-standing argument that a call to an ISP is just like a call to order pizza from a pizza parlor would make no sense if they were referring to a pizza parlor located across the state – or indeed in a different state – from the calling party, rather than to one physically located in the same local calling area as the calling party.

Q. ARE ALL CALLS DESTINED TO AN ISP CONTROLLED BY THE TERM "ISP-BOUND TRAFFIC"?

A. No. ISP-bound traffic controlled by the FCC's ISP-bound traffic regulation is traffic where the ISP's server physically resides within the same local calling area as the end user calling the ISP. The FCC defined a question and then responded

to the question – the entire discussion dealt with an ISP physically located within the calling party's local calling area. Traffic destined to an ISP physically located outside the local calling area of the end user calling the ISP was not defined as "ISP-bound traffic" and is not controlled by the *Order on Remand* nor the FCC's subsequent forbearance order (Order, In re Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, FCC 04-241, WC Docket No. 03-171, rel. Oct. 18, 2004).

The D.C. Circuit Court that reviewed the FCC order also recognized that the "interim [compensation] provisions devised by the [FCC] apply only to calls made to [ISPs] located within the caller's local calling area." (*WorldCom, Inc v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)) (Emphasis supplied)

MCI asserts that FCC interim regulations apply to all types of ISP traffic and not just to "ISP-bound traffic" as the FCC uses this term. It is without question that the FCC has jurisdiction over "ISP-bound traffic." What is critical in this dispute is an understanding of the scope of traffic to which the term "ISP-bound traffic" applies. When a FX or virtual NXX service is deployed to reach an ISP, traffic conveyed is not "ISP-bound traffic" and is subject to this Commission's prior decisions on virtual NXX traffic that reciprocal compensation should be based on the physical location of the calling and called parties, not the NXX codes of those parties. (See Order on Arbitration in Docket No. 2000-516-C, dated January 16,

2001 ("*Adelphia Arbitration Order*"); Order No. 2002-619 in Docket No. 2002-181-C dated August 30, 2002 ("*US LEC Arbitration Order*")).

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. I urge the Commission to reject MCI's erroneous attempt to include more types of traffic under the category of "ISP-bound traffic" than what the FCC and the Court reviewing the matter decided. Accordingly, I recommend the Commission adopt the RLECs' language for this disputed issue.

ISSUES 7 and 9: Does the contract need a definition of *Internet Protocol Connection*? Should the contract define VoIP and provide for special treatment of VoIP traffic?

Q. WHAT IS THE DISAGREEMENT REGARDING ISSUES 7 AND 9?

A. The disagreement between the parties on these issues centers around whether the agreement should provide special treatment of VoIP traffic and, therefore, whether it is necessary to define the terms "VoIP" and Internet Protocol Connection ("IPC") in the agreement.

Q. WHY DOES VOIP TRAFFIC NEED TO BE ADDRESSED IN THE AGREEMENT?

A. VoIP services are new services which require special attention and identification. The FCC has resolved some but not all VoIP issues. To the extent VoIP service is covered under this agreement, the RLECs believe it is paramount to identify properly such traffic and to address any related issues.

Q. HAS THE FCC DETERMINED THAT ALL VOIP TRAFFIC IS TO BE TREATED THE SAME AS PLAIN OLD TELEPHONE SERVICE ("POTS") TRAFFIC?

A. No. Although the FCC has addressed IP-to-IP VoIP traffic as well as traffic that uses IP only for transport of the call, *i.e.*, PSTN-IP-PSTN, the regulatory treatment of IP-to-PSTN or PSTN-to-IP is pending before the FCC. The latter type of VoIP traffic is exactly the type of VoIP service that TWCIS seeks to exchange with the RLECs through the intermediary services of MCI.

Q. IS THERE DISAGREEMENT IN THE INDUSTRY AS TO WHAT DETERMINES THE PROPER JURISDICTION OF VOIP TRAFFIC?

A. Yes. The dispute is whether the physical location of the end user customer, which is the geographical location of the actual Internet Protocol Connection (IPC), or the location where the call enters the PSTN determines the proper jurisdiction of the call. Given the uncertainty in the industry, the RLECs believe

that it is necessary to specifically address VoIP traffic in this agreement. As a result, there is a definite need to define VoIP and IPC in this agreement.

Q. SHOULD THE COMMISSION REQUIRE THAT THE AGREEMENT SPECIFICALLY ADDRESS VOIP TRAFFIC AS PROPOSED BY THE RLECS?

A. Yes. For the reasons stated above, the Commission should adopt the RLECs' language.

ISSUE 10(a): Should MCI have to provide service only directly to end users?

Q. WHAT IS THE DISPUTE INVOLVING ISSUE 10(a)?

A. This issue deals with whether MCI is entitled to obtain interconnection with the RLECs in its capacity as an intermediary carrier providing access to the public switched telephone network to a VoIP service provider. For the RLECs, the matter focuses on whether MCI is entitled to exchange VoIP service provider traffic under this agreement.

Q. DOES YOUR RESPONSE TO ISSUE 6 APPLY TO ISSUE NUMBER 10(a)?

A. Yes. I incorporate my response to Issue 6 as part of my response to this issue.

Q. HOW DOES THE REQUIREMENT TO INTERCONNECT UNDER SECTION 251(a) RELATE TO THE DUTY TO ESTABLISH RECIPROCAL COMPENSATION FOR THE EXCHANGE OF TRAFFIC UNDER SECTION 251(b)(5)?

A. There is a very clear difference between these two duties. MCI seemingly blurs the difference in an attempt to justify the indirect exchange of traffic. It attempts to combine the concept of indirect interconnection (a Section 251(a) duty) with the exchange of traffic (a Section 251(b)(5) duty). This is contrary to the FCC's interpretation of the Act.

The term "interconnection" refers only to a linking of networks, directly or indirectly, and does not refer to the exchange of traffic on those linked networks. Section 251(a) states: "Each telecommunications carrier has the duty (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers ...." The FCC has interpreted this requirement. Its rule defines "interconnection" as "the linking of two networks for the mutual exchange of traffic," and not "the transport and termination [exchange] of traffic." (47 CFR § 51.5)

The difference between "interconnection" for the exchange of traffic and the actual exchange of traffic is very important. The FCC explained this distinction in a case dealing with interconnection and the exchange of traffic:

> The term interconnection refers solely to the physical linking of two networks, and not the exchange of traffic

> between networks. In the Local Competition Order we specifically drew a distinction between "interconnection" and "transport and termination," and concluded that the term "interconnection," as used in Section 251(c)(2), does not include the duty to transport and terminate traffic. Accordingly, Section 51.5 of our rules specifically defines "interconnection" as the "linking of two networks for the mutual exchange of traffic," and states that the term "does not include the transport and termination of traffic." (*Total Telecommunications Services, Inc. & Atlas Telephone, Co., Inc. v. AT&T Corp.*, FCC 01-84, rel. Mar 13, 2001)

Based on this reasoning, the FCC concluded that Section 251(a) did not obligate AT&T to terminate Atlas' traffic even though AT&T was physically interconnected with Atlas under Section 251(a).

The D.C. Circuit Court affirmed the FCC's conclusion in the *Atlas* case that the duty to interconnect under Section 251(a)(1) does not encompass the exchange of traffic between networks. Rather, the duty under Section 251(a)(1) is a duty to interconnect either directly or indirectly, and that indirect interconnection through a meet point established with the regional Bell operating company meets that obligation. (***AT&T Corp. v. FCC***, 317 F.3d 227 (D.C. Cir. 2003) at 235; <u>see also</u> ***MCI Metro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.***, 352 F.3d 872 (4th Cir. 2003), reaching a similar determination)

Under the FCC's orders, affirmed by the courts, the RLECs do not have a duty under Section 251(a)(1) of the Act to exchange local traffic with MCI, or with TWCIS indirectly through MCI. The duty to <u>exchange traffic</u> involves the transport and termination of telecommunications under 251(b)(5). FCC rules

require that the compensation for telecommunications traffic exchanged between a LEC and a telecommunications carrier (reciprocal compensation) is "between two carriers and is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier." (47 CFR 51.701(e)) (Emphasis supplied)

Reciprocal compensation is for the mutual exchange of traffic that originates on the network facilities of the two exchanging carriers and not for traffic that originates or terminates on the network facilities of a third party. To the extent that TWCIS is a telecommunications carrier, TWCIS may interconnect indirectly to the RLECs under Section 251(a), but this does not allow it to exchange traffic with the RLECs under Section 251(b) via MCI without a specific agreement with the RLECs.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. This agreement should be limited to the exchange of traffic only between MCI's end users (as defined as the RLECs propose) and RLECs' end users. Other types of traffic exchange reside outside the scope of the duties under Section 251 and should not be included in this interconnection agreement. Issue number 10(a) should be resolved using the RLEC proposed language.

ISSUE 10(b): Should MCI have to provide service only to End Users physically located in the same LATA to be covered by this agreement?

Q. WHAT IS THE DISPUTE WITH REGARD TO ISSUE 10(b)?

A. This issue is related to the classification of traffic. The RLEC language provides a proper restraint to the type of traffic governed by this agreement.

Q. ARE THE RLECS ATTEMPTING TO LIMIT MCI TO PROVIDING SERVICE TO END USER CUSTOMERS PHYSICALLY LOCATED WITHIN THE LATA?

A. No. However, this agreement should only cover traffic between the parties for end users physically located in the same LATA. MCI already agrees that the physical location of the end user customers should govern the jurisdiction of traffic, with the exception of what MCI considers ISP-bound traffic (which the RLECs strongly dispute as explained in my testimony regarding Issue 8). The language proposed by the RLECs simply cements this mutual understanding and should be adopted by the Commission.

Q. HOW DOES THIS ISSUE RELATE TO ISSUE 8?

A. It is directly related. MCI desires to terminate RLEC-originated traffic to its ISP end user customers physically located outside the LATA and have this interconnection agreement govern the exchange of such traffic. I adopt my responses to Issue number 8 for this issue. Traffic that is not "ISP-bound traffic"

according to the use of this term by the FCC and the reviewing court should not be included as traffic governed by this interconnection agreement.

MCI argues that the FCC never imposed a restriction that "ISP-bound traffic" include only ISPs physically located within the local calling area of the originating end user customer. This novel position makes no sense when the entire issue is examined in context. The pizza parlor example I presented earlier is an example illustrating this nonsensical reasoning. The reason the FCC examined the matter in the first place was because of the introduction of local competition and reciprocal compensation. CLECs began targeting ISPs for customers within the ILEC local calling area to maximize their intercarrier compensation. Now MCI is attempting to expand the scope to traffic never intended to be included in the FCC's ISP-bound traffic determination.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. I recommend the Commission require traffic covered by this local interconnection agreement to be limited to traffic between MCI's end user customers and RLECs' end user customers physically located within the LATA.

ISSUE 11: Should reference to VoIP traffic be included in the contract?

Q. WHAT IS THE DISPUTE BETWEEN THE PARTIES REGARDING ISSUE 11?

A. As with issues 7, 9 and 12, the dispute centers on VoIP traffic. To the extent it is contained or controlled by this agreement, the definition and identification of VoIP traffic is necessary.

Q. HAVE YOU EXAMINED THE DISPUTED LANGUAGE FOR THIS ISSUE?

A. Yes. The language to which MCI objects includes one parenthetical clause "(including VoIP Services)" and two sentences describing the nature of VoIP traffic classification and the lack of RLECs' obligation to interconnect primarily for VoIP traffic.

Q. WHY ARE THE RECOMMENDATIONS OF THE RLECS IMPORTANT?

A. The classification of traffic as telecommunications service or information service is an area where more precision and exactness is preferred – especially in an interconnection agreement. MCI's position on this clarifying language is that it is confusing and unnecessary. (MCI position Issue 11) Thus, the objection isn't about the meaning conveyed by the words themselves – MCI apparently would agree with their meaning – rather, the objection is whether to include them in an interconnection agreement at all. I urge the Commission to defer to the party

seeking to have more precision and exactness in an interconnection agreement, especially when the other party argues the language will have no effect on its performance of the agreement. (MCI argues these provisions will have no meaning and thus they should be eliminated.)

I have discussed similar matters in Issues 7, 9 and 12 and incorporate my responses to those issues here.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. I urge the Commission to include the RLECs' clarifying language in the interconnection agreement describing VoIP traffic, its classification and the RLECs' obligations regarding VoIP traffic.

ISSUE 12: Should there be language treating VoIP differently than other non ISP-bound traffic?

Q. DO THE PARTIES AGREE THAT THE PHYSICAL LOCATION OF THE CALLING AND CALLED END USER CUSTOMERS GOVERNS THE RATING OF TRAFFIC?

A. Yes. Consistent with this Commission's policy, that is the RLECs' position. It is my understanding that MCI also agrees with this policy with the exception of the use of VNXX for dial-up ISPs. As I have already addressed in my response to

Issue 8 and its related issues, the RLECs do not agree with MCI regarding the term ISP-bound traffic.

Q. DOES THE LANGUAGE MCI DISPUTES IN ISSUE 12 PROVIDE AN EXACT DESCRIPTION OF HOW VOIP TRAFFIC SHOULD BE IDENTIFIED?

A. Yes.

Q. WHY IS THERE A NEED TO PROVIDE AN EXACT DESCRIPTION OF VOIP TRAFFIC AND ITS CLASSIFICATION IN THIS INTERCONNECTION AGREEMENT?

A. Despite the work done by the FCC regarding VoIP traffic, there is still a need to identify VoIP traffic in this interconnection agreement. Since this language attempts to identify the physical location of the VoIP end user, I recommend using this clear and precise definition.

There is another important need to have a precise understanding of VoIP traffic in this interconnection agreement. Mr. Darnell states that VoIP traffic "will be translated into industry standard PSTN format before it is handed to the RLECs." (Darnell Direct at 32:18-19) The proposed language is necessary to precisely define how this traffic will be rated and assigned a jurisdiction when it is translated. Without this precise language, there is no certainty on the part of the

RLECs how MCI will identify this traffic when it performs the IP-to-PSTN translation. The proposed language is critical for this purpose as well.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. Since MCI agrees that the physical location of end user customers should govern how traffic is rated, the RLEC language is necessary to ensure that VoIP traffic is governed according to this principle.

ISSUE 13: Should all intraLATA traffic be exchanged on a bill and keep basis or should reciprocal compensation apply when the traffic is out of balance?

Q. WHAT IS THE DISPUTE WITH THIS ISSUE?

A. As with issue 8, this issue deals with the scope and treatment of traffic governed by this agreement.

Q. WHAT IS RECIPROCAL COMPENSATION?

A. When two carriers exchange telecommunications originated on their networks by their end user customers, compensation for this traffic may apply. Compensation for IntraLATA traffic in this agreement should be in the form of the mutual exchange of services provided by the other party with no per minute of use billing. When traffic is roughly balanced, this mutual compensation is used as a mechanism to avoid the unnecessary time and expense of per minute of use

billing. It really doesn't make sense for carriers to bill each other since the net exchange would be roughly equal. In order to avoid the measurement of traffic, the rendering of a bill, and its collection – all of these processes can be time consuming and expensive – carriers can agree to a mutual exchange of service for this traffic. When a state commission arbitrates an issue of this nature, it may impose this regime on traffic when no party has rebutted the presumption of roughly equal traffic. (47 CFR § 51.713) Such is the case in this proceeding.

Q. DOES ISSUE 8 RELATE TO THIS ISSUE?

A. Yes. The definition of "ISP-bound traffic" and its use by the FCC and the courts plays an important role in this issue. Mr. Darnell states that the FCC's Order on Remand does not limit the location of the ISP to be physically located within the local calling party's local calling area. (Darnell Direct at 57:9-10) I strongly disagree. The context and scope of the FCC's *Declaratory Ruling*, the D.C. Circuit Court vacating and remanding that ruling, the FCC's *Order on Remand*, and the *Core Communications Order* granting forbearance all address "ISP-bound traffic" which is a term used to describe traffic where the ISP is physically located in the calling party's local calling area. MCI attempts to include as part of this precise definition all ISP traffic, including virtual NXX traffic and, for that matter, ISP traffic carried by an IXC to distant ISP locations. An example of MCI's expansive and inappropriate reading is that a dial-up ISP toll call from a customer physically located in Monck's Corner to an ISP AOL modem in Los Angeles California would be classified as ISP-bound traffic and subject to the

Order on Remand provisions instead of interstate access rules. This is not a correct reading of FCC rules and policy.

As discussed previously MCI is attempting to provide virtual NXX service to ISPs physically located outside the LATA. In this instance reciprocal compensation does not apply to this traffic because it is not "ISP-bound traffic" as this term is used and understood by the FCC and the reviewing court. Consequently, the only traffic that would be subject to reciprocal compensation is any remaining intraLATA traffic, which is presumed to be roughly balanced. MCI has not rebutted this presumption as required by FCC regulations implementing Section 251.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. I recommend the Commission adopt the proposed RLEC language.

ISSUE 15: Does the contract need the limit of "directly provided" when other provisions discuss transit traffic, and the issue of providing service directly to end users is debated elsewhere?

Q. WHAT IS THE DISPUTE WITH RESPECT TO ISSUE 15?

A. MCI claims there is an alleged inconsistency with the RLECs' position on indirect traffic because the agreement addresses and allows for transit traffic, which is another form of indirect traffic.

Q. ARE ISSUES 6 AND 10 RELATED TO THIS ISSUE?

A. Yes. I incorporate my responses to those issues as part of my response to this issue.

Q. DOES THE TRANSIT TRAFFIC PROVISION IN THE AGREEMENT PLACE OBLIGATIONS OR RESPONSIBILITIES ON THIRD PARTY CARRIERS?

A. No. The only reason transit traffic is mentioned in the interconnection agreement is because MCI may use an RLEC tandem to transit to a terminating third party. The only situation where this would arise is if an RLEC provides transit for MCI to another carrier -- like a CMRS carrier or other CLEC – that has "homed" its NPA/NXX off of the RLEC tandem. In this instance, MCI would pay the RLEC its transit rate. MCI does not dispute this transit option in the agreement.

The interconnection agreement specifically states that payment of reciprocal compensation for transit traffic is not part of this agreement but instead must be negotiated between MCI and the third party.

The treatment of transit traffic within this agreement is consistent with the FCC policy that carriers may have indirect interconnection (Section 251(a)) but must also have a direct contractual arrangement for the exchange of traffic with a LEC (Section 251(b)(5)). I have discussed this position in issues 6, 10(a) above.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THIS ISSUE?

A. I recommend the Commission allow the provision of transit traffic as it relates to MCI transiting the RLEC tandems and retain the RLECs' language to limit the interconnection for the exchange of traffic to include only MCI's end-user traffic and the RLECs' end user traffic originated on their respective networks. Because MCI is likely to use certain RLEC tandems for transiting to third party carriers, the need to identify "directly provided" is still critically important for traffic exchanged between MCI and the RLECs, and the RLEC language should be maintained.

ISSUE 17: Should the Parties be providing service directly to end users to port numbers?

Q. ARE ISSUES 6, 10 AND 15 RELATED TO ISSUE 17?

A. Yes. I incorporate my responses to those issues in this issue as part of my response.

Q. WHAT OBLIGATIONS DOES A LEC HAVE REGARDING NUMBER PORTABILITY?

A. While there are other types of number portability, service provider portability is the only type of portability that the RLECs are required to provide under Section 251 of the Act.

Q. WHAT IS THE DEFINITION OF SERVICE PROVIDER LOCAL NUMBER PORTABILITY?

A. The FCC's definition of service provider portability is:

> The term service provider portability means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another. (47 CFR § 52.21(q))

Q. ARE THE RLECS WILLING TO PROVIDE SERVICE PROVIDER PORTABILITY TO MCI FOR MCI END USER CUSTOMERS?

A. Yes. The dispute in this issue does not relate to service provider local number portability between RLEC and MCI end user customers. The dispute deals solely with MCI's desire for the RLECs to provide number portability from the RLECs through MCI to a third party with whom the RLECs do not have an agreement.

Q. DOES A NUMBER PORTED BY AN RLEC END USER TO A VOIP SERVICE PROVIDER VIA MCI FALL WITHIN THE DEFINITION AND REQUIREMENTS OF SERVICE PROVIDER PORTABILITY?

A. No. The definition of service provider portability has several criteria. First, the same end user must retain the number both before and after the port. This means the RLEC customer wishing to port must have control of the number as the end user changes carriers. Second, the end user must be in the same location before and after the port. Third, the end user must have telecommunications service before and after the port. Fourth, the end user must be switching from one telecommunications carrier to another telecommunications carrier. MCI's proposal fails to satisfy several of these criteria.

An argument can be made that the first criterion is not satisfied. MCI has stated that it is the carrier that is going to port the number and that TWCIS is its customer. If this is true, then the number is being ported from the RLEC end user customer to MCI's customer – i.e., TWCIS – and the customer is not the same

before and after the port. If control of the number has been transferred to another customer -- from the RLEC residential end user to TWCIS – it is unclear who retains control of the number. For example, a Home Telephone Company end user porting his number to TWICS may not be able to subsequently port this number to another VoIP service provider or another telecommunications carrier, or even to return his service to Home Telephone.

The third criterion is not satisfied. According to TWCIS, it does not offer telecommunications service. The third criterion would not be met because the end user does not have telecommunications service after the port is complete. The end user has contracted with TWCIS for a VoIP service, not with MCI for a telecommunications service.

The fourth criterion also fails in this instance. Even if a port were to occur to TWCIS – who is the provider of services to its end users – the residential end user is not being served by a telecommunications carrier.

Q. IF MCI IS SELLING TELECOMMUNICATIONS SERVICES, WHY DOES THE PORT NOT COMPLY WITH THE DEFINITION OF SERVICE PROVIDER PORTABILITY?

A. MCI proposes to sell telecommunications services to TWCIS. TWCIS has stated it seeks to sell VoIP service to its end users. The definition of porting requires the user of telecommunications service to be the same entity before and after the port.

Mr. Darnell misrepresents the porting requirement by commenting on only one of the four criteria for porting. (Darnell Direct at 28:16-20) TWCIS is a user of telecommunications service but it is not the end user of telecommunications service at the same location that is changing telecommunications carriers.

Q. IS THERE A PUBLIC INTEREST ISSUE WITH PORTING NUMBERS TO MCI FOR A VOIP SERVICE PROVIDER'S END USERS?

A. Yes. Telecommunications carriers have obligations surrounding porting of telephone number while other companies do not. As mentioned in the first criterion, it is important that the end user at the beginning of the port controls the number after the port. If a VoIP service provider controls the number it could deny the end user the ability to port the number back to the RLEC or to any other carrier. This is because the VoIP service provider may not be a telecommunications service provider and, therefore, would not have any porting obligation under the Act.

This concern is also apparent in the aftermath of the SBC Internet Services, Inc. ("SBCIS") waiver. Pac-West states correctly in its Petition for Clarification of the FCC's decision:

> Thus, by issuing the Waiver Order, the [FCC] has cast confusion on the related issue of whether these entities [VoIP providers] will remain users of telecommunications services such that they have no legal obligation to port telephone numbers to other providers of communications services, including traditional providers of telecommunications services ....

(Petition for Clarification of Pac-West Telecomm, Inc., CC Docket No. 99-200, March 3, 2005 at 4) Further, there remains an important public policy question whether VoIP providers are obligated to comply with federal slamming rules (See 47 CFR § 64 subpart K) when functioning as a non-telecommunications carrier. If these obligations do not apply to VoIP providers, important consumer protections for South Carolina customers will be lost. If the Commission were to adopt MCI's position, I believe these obligations will be avoided by VoIP providers.

Q. MR. DARNELL SUGGESTS THAT THE SERVICE PROVIDER DEFINITION USES THE WORD "USERS" AND NOT "END USERS." DO YOU AGREE THIS SUPPORTS MCI'S POSITION?

A. No. I believe Mr. Darnell has taken too narrow a view of this definition. As I mentioned previously, the residential user is not TWCIS. Thus, under the definition, "the ability of users of telecommunications services to retain" suggests that the "users" are the same entities before and after the port. Under MCI's own logic, the "user" would change and thus render the words "to retain" meaningless.

Q. MCI CLAIMS THE FCC HAS GRANTED VOIP PROVIDERS THE OPPORTUNITY TO PORT NUMBERS. DO YOU HAVE ANY COMMENT ON THIS DEVELOPMENT?

A. Yes. The FCC has granted a waiver of its rules for SBCIS. However, TWCIS has not filed for a similar waiver. The FCC did not grant all VoIP providers the

waiver of its rules. The FCC states: "To the extent other entities seek similar relief we would grant such relief to an extent comparable to what we set forth in this Order." (Darnell Direct at 27:6-7) MCI has not provided any evidence that TWCIS would qualify for "similar relief," nor has it sought such relief from the FCC. Lastly, the matter with SBCIS involved obtaining numbers directly from the North American Numbering Plan Administrator and not porting numbers through an intermediary.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION ON THIS ISSUE?

A. I recommend the Commission determine that what MCI is requesting does not fall within the definition of service provider portability and, therefore, the RLECs are not obligated to provide the service requested by MCI. The Commission should adopt the proposed RLEC language in the interconnection agreement.

ISSUE 21: What should the reciprocal compensation rate be for out-of-balance local/EAS or ISP-bound traffic?

Q. PLEASE DESCRIBE THE NEGOTIATIONS BETWEEN THE RLECS AND MCI REGARDING THIS ISSUE.

A. I understand that during the negotiations the balance of traffic was presumed to be relatively balanced. Consequently, no reciprocal compensation rate was negotiated. Since this matter was never even discussed, it is not ripe for

arbitration. To the extent the Commission determines the need to address this matter, it should order the parties to negotiate a reciprocal compensation rate as part of the implementation of the arbitration decision. At present this Commission does not have a properly presented arbitration issue to resolve.

Q. DO YOU AGREE THAT MCI'S PROPOSED $0.0007 RATE IS THE APPROPRIATE RATE TO APPLY IN THE EVENT THAT THE TRAFFIC EXCHANGED BY THE PARTIES IS OUT-OF-BALANCE?

A. No. The $0.0007 rate was established by the FCC with specific conditions. Specifically, this rate only applies if an RLEC has opted into the interim compensation mechanism established by the FCC. (ISP Remand Order at 89) None of the RLECs have opted into the FCC's interim compensation mechanism. Consequently the $0.0007 per minute rate does not apply to the RLECs.

Q. WHAT DO YOU RECOMMEND BE DONE BY THE COMMISSION REGARDING THIS ISSUE?

A. I recommend the Commission reject the issue as not properly presented for arbitration.

Q. WILL YOU PLEASE SUMMARIZE YOUR TESTIMONY?

A. Many of the issues I address are interrelated policy questions. I have presented testimony recommending to the Commission that an interconnection agreement is limited in scope to the traffic exchanged between two parties' networks – traffic

that was originated by end users of the parties' networks and not traffic of third parties. This is a well established policy that is receiving new attention as VoIP providers are seeking to exchange traffic with local exchange carriers. Despite their best efforts to avoid certain federal and state regulations, the VoIP providers need to realize there are restrictions and limitations imposed on Section 251 interconnection agreements negotiated for the purpose of the exchange of traffic.

I have also presented testimony regarding the mutual exchange of traffic. I have shown that the traffic governed by this interconnection agreement should include all MCI end user traffic for customers physically located in the LATA. Traffic for ISPs located outside the LATA are not part of this agreement. This is what the FCC and the reviewing court have determined and this is the right policy decision for South Carolina given this Commission's prior orders on virtual NXX traffic.

There are several issues for which my testimony recommends clear and precise definitions of VoIP traffic. These definitions are necessary to properly identify and treat VoIP traffic within the regulatory framework established for more traditional telecommunications. Because federal policy attempts to provide clear rules with respect to VoIP have not addressed all of the various VoIP flavors, these definitions are critical for the interconnection agreement to function.

I also provide testimony on various other issues related to sound business practices between carriers. These provisions provide for a clear understanding of the responsibilities of both parties to make payments and provide for proper assignment of liabilities and indemnification.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes.